precisely the same in its nature and effect as the increases in 1943 and 1944, and it was undoubtedly an increase "by the landlord".

The increase in 1945 stands on a slightly different footing. Soon after the re-occupation, the Japanese decree restricting the rent to a sum less than the pre-occupation rent ceased to have effect, and it was therefore lawful, in the case of a monthly tenancy, to give notice of an increase of rent within any statutory limits which might obtain — the limit in this case being the pre-occupation rent of $150 per month. In any case where there was a pre-occupation contract it may have been lawful to charge the pre-occupation rent without any notice at all. It seems from a letter dated 14th November, 1949, that on the re-occupation the landlord at first considered himself bound by a standard rent of $75, and that he collected only this amount in September, October and November, 1945, but thereafter collected in respect of those months a further sum making the rent up to $150 per month. I think that this also was an increase of rent "by the landlord" within the meaning of the agreement. This payment of the rent in two instalments, if I may so describe it, was not referred to in the oral evidence, which merely indicates payment of $150 from September, 1945. It almost certainly explains why, according to the other evidence, the appellants did not raise the rent of the respondent in September, 1945, but does not quite explain why they deferred doing so until January, 1947.

Although I am inclined to think that the agreement is unambiguous in its terms, I proceed to consider it on the basis that there is a latent ambiguity in the word "rent", which will admit evidence of the conduct of the parties in explanation of the word's meaning.

It is of some importance to note that at the outset of the appellants' tenancy the head-landlord sought to induce them to accept a lease in which the rent of $150 was mentioned, and that the appellants refused to do so. If they had done so, it might be easier to suppose that they had the figure of $150 in mind when the agreement of 30th September, 1942, was made.

It is much more important to observe that the respondent never protested against the successive increases of his rent at any time prior to his allowing the rent to fall into arrears, and so affording the appellants an opportunity to eject him. His case on this point was never clearly formulated, as far as I can see, until his defence was filed in this action, and even after that he shifted his ground more than once. The learned trial judge gave judgment in his favour for much more than his counsel said he was claiming. The respondent must have been well aware of the various Japanese decrees and their effect in increasing the *de facto* rent of the appellants. He also knew that the head-landlord could not possibly have raised the rent in April, 1943, above the figure of $150. It seems certain, therefore, that if at the time of making the agreement of 30th September, 1942, he had intended by the word "rent" to indicate the sum of $150 per month, he would have protested at the time of the first increase of his rent and would have refused to pay the $72 demanded. The only possible conclusion from this is that the "rent" which he had in contemplation was the figure of $75 per month, the rent which was in fact then paid.

Both lines of argument therefore lead me to the same conclusion, that the rent referred to in the agreement was the figure of $75 per month and the increases against the respondent were lawfully and properly made. In consequence the respondent was in arrears at the time when the action was brought and his tenancy could be and was determined under the forfeiture clause.

This tenancy was not determined by notice, but under the express provisions of the agreement. Accordingly the respondent's arguments as to insufficiency of the notice to quit are irrelevant.

I would allow this appeal and set aside the judgment of the learned trial judge both on the claim and on the counter-claim. On the claim there should be an order for possession of the premises on or before the 30th September, 1950, and an order that it be referred to the Registrar to enquire what sums are and will be due by the respondent to the appellants in respect of rent up to that date. There should be an order for payment of double value thereafter in the event of failure to deliver up possession. The counter-claim should be dismissed. The respondent should pay the appellants' costs of both claim and counter-claim in the Court below, and of this appeal. The deposit of $500 should be paid out to the appellants' solicitors.

Order accordingly.

YAACOB BIN LEBAI JUSOH v. HAMISAH BINTI SAAD.

[Court of Appeal (Pretheroe, Ag. C.J., Jobling and Briggs, JJ.) September 1, 1950]

[F.M. — Civil Appeal No. 22 of 1950]

Conveyance of land — Subsequent agreement by purchaser to re-sell the land to the vendor at the same price — Whether intention was to create a mortgage — Jual Janji.

In this case the appellant asked for an order to direct the respondent to transfer certain land to the appellant. It appeared that the appellant sold the land in question to the respondent on 28th October, 1944, and that the respondent paid therefor the sum of $2,000/- in Japanese currency. On 30th January, 1945, the respondent entered into a written agreement to re-sell the land to the appellant for $2,000/- after a period of three years commencing on 1st February, 1945, the agreement to become null and void if the appellant failed to re-purchase. The appellant remained in possession of the land throughout. At the trial the learned trial Judge held that the agreement to re-sell was an option given by the respondent to the appellant to re-purchase and that as it contained no promise by the appellant to re-purchase the agreement was without consideration and was therefore of no effect.

Held, (1) that in the circumstances of the case there was evidence to show that the real intention of the whole transaction was to mortgage the land to secure the repayment of the sum of $2,000/- and to give the appellant the right to redeem; (2) that as the agreement was in the nature of a mortgage the right to redeem remained, although the period within which it was specified the loan should be repaid had expired; (3) that the appellant was therefore entitled to an order for the transfer of the land to him upon his paying the respondent a sum equal to $2,000/- Japanese currency revalued under the Debtor and Creditor (Occupation Period) Ordinance, 1948, as at 28th October, 1944.

Cases referred to :—

(1) *Douglas v. Calverwell* 135 Revised Reports 11.

(2) *Haji Abdul Rahman v. Mohamed Hassan* (1917) A.C. 209.

CIVIL APPEAL.

Ong Huck Lim for the appellant.

Lim Cheng Ean for the respondent.

Pretheroe, Ag. C.J. : — I have had the advantage of reading the judgments prepared by Jobling and Briggs, JJ. I agree with both judgments and have nothing to add thereto. The appeal is allowed and the Order of the Court will be as proposed by Jobling J.

Jobling, J. : — This is an appeal against the judgment of the High Court at Alor Star dismissing the plaintiff's claim for an order directing the defendant to transfer certain land to the plaintiff.

The facts which were agreed by the parties are as follows :—

The plaintiff sold the land in question to the defendant on 28th October, 1944 and the defendant paid therefor the sum of $2,000 in Japanese currency. On 30th January, 1945 the defendant entered into a written agreement to re-sell the land to plaintiff for $2,000 after a period of three years commencing on 1st February, 1945, the agreement to become null and void if the plaintiff failed to re-purchase at the end of three years. This agreement was signed by the plaintiff as the person who agrees to re-purchase. The plaintiff remained in possession of the land and is still in possession.

The learned trial judge held that the agreement to re-sell was an option given by defendant to plaintiff to re-purchase and that as it contained no promise by the plaintiff to re-purchase the agreement was without consideration and therefore of no effect.

The appeal has however been argued on the ground that the intention of the whole transaction — the sale and the agreement to re-sell — was to mortgage the land to secure the repayment of the sum of $2,000 and to give the plaintiff the right to redeem, and I think the matter can be decided on this issue.

Douglas v. Calverwell[1] is authority for treating an absolute conveyance of land as a mortgage to secure money advanced when there is sufficient evidence to satisfy the Court that that was the intention of the parties at the time the conveyance was executed.

Is there sufficient evidence in this case to satisfy the Court that the intention of the parties was as stated by the plaintiff?

There are two facts from which we are asked to infer this intention. *First*, from the fact that the plaintiff remained in possession of the land, and *secondly*, from the nature of the agreement of 30th January, 1945.

The fact that the plaintiff remained in possession is consistent with an arrangement between the parties that the transfer of the land was only a transfer as security and in the absence of evidence of any contrary intention I think it may legitimately be inferred that that was the arrangement.

The agreement itself is a curious one. For no apparent reason the defendant three months after having purchased the land gives the plaintiff the right to re-purchase it for the same amount after a period of three years. The agreement appears to be related to the sale three months before as there are references to plaintiff buying back the land and for the same amount as he sold it.

I think this document justifies the inference that it was prepared and executed to carry out some prior arrangement between the parties. The plaintiff in his pleadings gives a reasonable explanation of what that arrangement was; the defendant stands on the document and asks for it to be construed as an option given without consideration. Here again I think in the absence of any evidence to the contrary the plaintiff's explanation must be accepted.

In my opinion therefore the inferences to be drawn from these two facts are sufficient to satisfy the Court that the agreement formed part of a transaction which was in essence a mortgage of the land in question to secure the repayment of $2,000.

For the defence it was submitted that in any case the agreement of 30th January, 1945, was void as the plaintiff had not re-purchased the land within the stipulated period of three years. But in *Haji Abdul Rahman v. Mohamed Hassan*[2] the Privy Council laid down that where an agreement is in the nature of a mortgage the right to redeem remains irrespective of whether or not the period within which it is specified the loan shall be repaid has expired. The stipulation that the land shall be re-purchased within three years does not therefore affect the plaintiff's right to redeem.

I think the agreement of 30th January, 1945, should be construed as a mortgage and that this appeal should be allowed with costs and an order made for the transfer of the land to the plaintiff upon his paying the defendant a sum equal to $2,000 Japanese currency revalued under the Debtor and Creditor (Occupation Period) Ordinance, 1948, as at 28th October, 1944.

Briggs, J. : — I have had the advantage of reading the judgment of Mr. Justice Jobling. I entirely agree with it, but, as we are differing from the learned trial Judge, I express my own views shortly.

The essential point of this case was whether the agreement of the 30th January, 1945, was so linked with the transfer of the 28th October, 1944, that one should infer that it represented a record, subsequently made, of an oral agreement, contemporaneous with the transfer, that the transfer was to be merely by way of security. The learned trial Judge found no such link; but I think it existed in the retention of possession of the land by the vendor upon the transfer. If this was not to be taken as indicating that the transfer was made by way of security only, it was for the defendant to offer evidence explaining it on some other grounds, which he failed to do. In the absence of such evidence I am satisfied that the transaction was the familiar one of *jual janji*. The wording of the agreement and the amount of the consideration for re-transfer (in a rapidly depreciating currency) tend to support this view. Once that is established, it matters not whether the agreement was in form an agreement of purchase and sale or an option. The case of *Haji Abdul Rahman v. Mohamed Hassan*[2] shows that in either event time is not of the essence of the contract, since the later transaction will be in effect a redemption. I am inclined, however, to think that on a true construction the agreement was one of sale. The words "Mark of person who agrees to re-purchase" should, I think, be given their full effect.

I agree that this appeal should be allowed, and concur in the order proposed by Mr. Justice Jobling.

Appeal allowed.

LIM EOW THOON & ANOR. v. TAN PENG NEOH (m.w.).

[Court of Appeal (Pretheroe, Ag. C.J., Russell and Briggs, JJ.) August 31, 1950]
[F.M. — Civil Appeal No. 19 of 1950]

Will — Creation of trust — Termination of trust.

By her will, Lee Chu Nio (deceased) created a trust in the following terms:— "I give and devise unto my trustees my house known as the Grange Tanjong Bungah together with the compound consisting of four acres to hold the same as a family residence for so long as the law allows that is to say for twenty-one years after the death of the last of my children or grandchildren living at my death who shall survive me for the use of my children and their descendants including adopted children ....." The testatrix died on the 18th May, 1924. In the year 1930 an originating summons was brought into Court and Sproule, J. made an order on the 12th December, 1930, approving "the terms of settlement of all questions arising in this suit" which were set out in a long schedule attached to the order. Among the properties so distributed was the Grange. The matter came before the Court again in April 1950 and Jobling, J. decided that the Grange was no longer subject to the trust created by the will of the testatrix. No mention was made of the trust in the order of Court and some of the cestuis que trust were not represented.

Held, that as there was no express provision in the order of the 12th December, 1930, to terminate the trust and as no provision was made for the interests of unborn beneficiaries, the trust was not extinguished by the order.

Cases referred to :—

(1) *Re Whiting* (1905) 1 Ch. 101.
(2) *Cardigan v. Curzon Howe* (1901) 2 Ch. 479.
(3) *Fussell v. Dowding* 27 Ch. D. 237 at page 240.

CIVIL APPEAL.

F. G. Pooley for the appellants (1st and 2nd defendants).

Ong Huck Lim (*Khoo Eng Cheang* with him) for the respondent (plaintiff).

T. E. Conaghan for Theang Heang Neoh and Wee Poh Neoh and also the estate of Wee Gim Neoh, deceased.

Khoo Soon Chee for Acting Senior Assistant Registrar, Supreme Court, Penang.

Cur. Adv. Vult.

Pretheroe, Ag. C.J. : — I have had the advantage of reading the judgment prepared by Briggs, J. I am in agreement with his decision, but I will briefly set out the reasons for my opinion, as we are differing from the learned trial Judge. The facts are fully set